Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

AL DICKSON, FRED RIGGS, DONNA SINGER AND MICHELE LYMAN AND HELEN VALDEZ,
PETITIONERS

v.

SAN JUAN COUNTY AND CURRENT COMMISSIONERS; SAN JUAN HEALTH SERVICES DISTRICT AND CURRENT BOARD MEMBERS; J. TYRON LEWIS; BILL REDD; CRAIG HALLS; REID M. WOOD; CLEAL BRADFORD; ROGER ATCITTY; JOHN LEWIS; JOHN HOUSEKEEPER; KAREN ADAMS; PATSY SHUMWAY; RICK BAILEY; LAURIE SCHAFER; LYN STEVENS; JAMES D. REDD; L. VAL JONES; MANFRED R. NELSON; RICHARD BAILEY; MARILEE BAILEY; ORA LEE BLACK; GARY HOLLADAY; LORI WALLACE; CARLA GRIMSHAW; GLORIA YANITO; JULIE BRONSON; TRUCK/FARMER'S INSURANCE; R. DENNIS ICKES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ISSUE 1: Whether by Article VI Sec. 2, the Supreme Law of the Land, the question of Navajo Nation civil jurisdiction over non Indian defendants, is a 'judiciable' question, within Article III Court authority to define by *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) ("*Montana*") judicially-made limitations on Indian Courts over non Indian defendants, in light of,

> **(A)** the District Court below, and Navajo Nation Supreme Court, identifying that Navajo Nation history shows express Congressional acts, executing into domestic law, the Navajo Treaties of 1868 and 1849 and Navajo law--never intending to limit Navajo Nation *equal* civil legal authority over all Indian and non Indian persons (exactly *opposite Montana*'s Allotment Act and Crow Allotment Acts); and,
>
> **(B)** since 1981's *Montana*, the President, and Congress have executed into domestic law, the 1992 Senate-ratified, United Nations International Covenant on Civil and Political Rights ("UNICCPR") Treaty—by enacting the Indian Self Determination and Education Assistance ("ISDA") nation-to-nation Indian self-governance contract program (25 U.S.C. §§450 et seq), among other statutes, wherein Congress and the President defines Navajo Nation Court *equal* civil authority over *all* persons, by *Navajo* statutes' jurisdictional definitions; and
>
> **(C)** these Petitioners, and all like-situated Plaintiffs, by *Montana*, are being denied *all*

access to their only Congressionally-recognized Due Process for legal injuries within the Navajo Nation?

ISSUE 2: Whether this United States Supreme Court and District Courts, exceeds 5th and 14th Amendment restraints, by adopting and applying a vague Federal Rule of Civil Procedure at 16, that gives *full* discretion to a United States District Court (1) to dismiss *any evidentiary-supported* claims as 'frivolous', by this Court not defining 'frivolous'; and (2) by any means the District Court so selects, (3) *sua sponte* without an evidentiary hearing for disputed facts, such that these Petitioners Lyman and Valdez were denied *all access* to their only Federally-recognized legal redress for federal Constitutional and statutory violations?

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OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals : *Dickson et al v. San Juan County et al*, No. 08-4148 (10th Cir. 12/10/2009)("*Dickson*") P. Ap. at 1a-14a. The *Dickson* Panel graciously captioned these two sets of Petitioners in its Judgment, and incorporated by reference all the key rulings for both sets of petitioners. (P. app. 2-3a for Navajo Court claimants Petitioners Dickson, Riggs, and Singer)[1] (P. App. 12a *fn.1*, for Petitioners Lyman and Valdez, federal law claimants). [2]

JURISDICTION

The 10th Circuit Court of Appeals entered its judgment on December 10, 2009. This Court has Article III and Article VI original jurisdiction, and by 28 U.S.C. §§1291, 1254(1), 2106, 1343, and 1651, if necessary. *Burks v. United States*, 437 U.S. 1 (1978). U.S. Supreme Court rule 13.

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[1] *MacArthur v. San Juan County et al*, 309 F. 3d 1216(10th Cir. 2002) "**2002 MacArthur** I" P. app. 3a
(2002 U.S. App. LEXIS 20987,*;309 F.3d 1216)
MacArthur v. San Juan County et al, 391 F. Supp. 895 (D. Utah 2005)" **2005 MacArthur** II" P. app. 3a
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MacArthur v. San Juan County et al, 497 F.3d 1057, (10th Cir. 2007) "**2007 MacArthur** III" P. app. 2a
(2007 U.S. App. LEXIS 17008,*;497 F.3d 1057)

[2] *MacArthur et al v. San Juan County et al*, **416 F. Supp. 2d 1098**, 1201 and fn. 120 (D. Utah, 2005)(MacArthur at 416 F. Supp.2d")
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RELEVANT PROVISIONS INVOLVED (see appendix)

STATEMENT

A. Procedurally

The *Dickson* case being appealed had federal jurisdiction to hear the appeal under 28 U.S.C. §§1331, 1291, 1294, and the Federal Rule of Appellate Procedure at 4. The case was originally an appeal for only the Navajo law Petitioners Dickson, Riggs, and Singer. However, Defendants interjected the Federal law Petitioners Lyman/Valdez into it. So, *sua sponte*, the *Dickson* panel, in its judgment below, graciously chose to incorporate by reference, and caption, *both* sets of Petitioners' and rulings, stemming from the single Utah United States District Court case 2:00cv0584 case, never moved to be or *sua sponte* bifurcated. Now, *one* U.S. District Court judge identifying the facts and issues (all *MacArthur* f. supp. Rulings); *three* 10th Circuit Court judges in *Dickson* (P. App. 11a), and *one* Navajo District Court judge in the Tribal orders, and *three* Navajo Supreme Court Justices in *Ford Motor v. Kayenta*, *infra*, (as separate case with similar issues identified for an amicus standing) –8 judges– in Congressionally –recognized Courts, all identify these Petitioners position has legal support. The two Constitutional provisions involved are:

> **U.S. CONSTITUTION ARTICLE VI TREATY 'SUPREMACY CLAUSE'**
>
> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made,

> under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (P. App. 35a) Emphasis added.

U.S. CONSTITITUTION 5TH AMENDMENT DUE PROCESS CLAUSE

> "No person shall ....be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."(P. App. 34a)

It appears that the principals of the 5th Amendment have been made the Article VI 'supreme law of the land', by the United States in 1992 ratifying an International Treaty that pertains to both Indian law and equal access to Due Process.

B. Facts and Nature of this Case

These Petitioners, and like-situated Petitioners, have *no access* to civil legal redress anywhere, based on this Court's (1) the *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) ("*Montana*") judicially-created doctrine (Petitioners Dickson, Riggs, and Singer denied enforcement of Navajo Court orders and ability to exhaust tribal remedies) [3], and (2) a

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[3] **Navajo Petitioners' Facts** Respectfully disagreeing with *Dickson*'s citation to the 2007 *MacArthur* III court for the 'facts' involved here, (P. app. 2a), these Petitioners refer this Court to the 2002 MacArthur I case, *3-6, for an nearly perfect summary of the facts regarding the Navajo Petitioner's case claims. These Navajo

Federal Rule of Civil Procedure (FRCP) Rule 16(c)(2)(A) facially and as applied, that gives *full* discretion to a District Court to define 'frivolous' , by any methods, even as to dismissing the case, with over 100 disputed facts, as supported by affidavits, depositions, and other evidence, without an evidentiary hearing (Petitioners Valdez, Lyman denied all access to an evidentiary hearing or trial) as the docket shows.[4]

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law – counter- claiming municipal corporation, non state, respondents, were found to be intentionally injuring (a) these Petitioners, (a) an entire class of Navajo clinic-dependant Treaty-protected patients being driven by Respondents intentional and knowingly injurious acts, and (c) the Navajo Court processes itself when Respondents denied their actions. Id. If these Respondents were a 'state', they waived sovereign immunity when they fully litigated false Navajo common law claims with Navajo Bar counsel and live and present witnesses for examination and cross examination, *unlike* New Mexico counterclaiming ONLY sovereign immunity, in *Mescalero Apache Tribe v. State of N.M.*, 131 F.3d 1379 (C.A.10 (N.M.), 1997). 2005 *MacArthur* at 1041-1042.) *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, (10 th Cir. 1999).

[4] **Federal Petitioners' Facts:** See Docket, P. ap.36-41a : (1) dkt. # 300 , the District Court issued an order setting the deadline for all dispositive motions on the ORIGINAL complaint(P. App.36a); (2) dkt. #438, Plaintiffs Lyman and Valdez moved the Court to amend their original complaint that absolutely did contain Mrs. Valdez's and Lyman's claims (P. App. 36a); (3) dkt. # 443-457 , after the deadline for dispositive motions, Def's counsel filed several dispositive motions, for the ORIGINAL complaint within a day or two of the Rule 16 hearing on the ORIGINAL complaint(P. App. 7a-38a); (4) dkt. #742 , the District Court denied amending the ORIGINAL complaint, refused to sign the pretrial order, and orally dismissed their original complaint claims *orally* without a written order (P. app.39a 41a); (5) ending 2.5 years later in a written 190 page order, *MacArthur et al v. San Juan County et al*, 416 F. Supp. 2d 1098 (D. Utah, 2005) (a) *sua sponte* allowed the AMENDED complaint, *non pro tunc*, back to the date of the hearing on the ORIGINAL complaint, vacating that original

Any appeal is 'frivolous' as no court can 'abuse' discretion if by rule it has full discretion. Such vagueness, exceeds the Supreme Court's rule making authority. *Grayned v. City of Rockford*, 408 U.S. 104,108-109(1974) 1972 U.S. LEXIS 26,*7-8;408 U.S. 104; 92 S. Ct. 2294; 33 L. Ed. 2d 222 [5]
FRCP at 16(c)(2)(A) (P. App. 35a) reads as follows:

> "At any pretrial conference, the court may consider and take appropriate action on the following matters: ...(c)(2)(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses; "

See, MacArthur at 416 F. Supp. 2d 1098, 1201 and fn. 120 (D. Utah, 2005),

> "120. Neither Fed.R.Civ.P. 16(c)(1) nor the accompanying advisory committee notes articulate the legal standard to be applied in determining whether a claim or defense is "frivolous" within the meaning of the rule. The

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complaint hearing, (at pg. 1209)and (b) *sua sponte* made factual findings, some heatedly contested by the parties, (generally) (c) *sua sponte* applying them to the AMENDED complaint, *sans* a FRCP rule 16 hearing on the AMENDED complaint.

[5] Id. ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. n3 Second, if arbitrary and discriminatory enforcement is to be prevented, laws [*8] must provide explicit standards for those who apply them.")

> advisory' committee note to the 1983 amendment to Rule 16 makes general reference to a case from the D.C. Circuit, *Meadow Gold Products Co. v. Wright*, 108 U.S.App.D.C. 33, 278 F.2d 867 (D.C.Cir. 1960). .... does not speak of "frivolous" claims. 278 F.2d at 869 (quoting *Rosden v. Leuthold*, 107 U.S.App.D.C. 89, 92, 274 F.2d 747, 750 (D.C.Cir.1960))."

Id.

C. This Case is a Subject Matter Jurisdiction Challenge

At its earliest inception, *every* injury had just redress. *Marbury v. Madison*, 5 U.S. 1 Cranch 137 137, 163 (1803)([6]). *Ins. Co. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694 (1982)("Federal courts are courts of limited jurisdiction [under].... Art. III, § 2, cl. 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction."). Thus, *all* persons have an 'inalienable' right to equal access to United States Constitution's 5th Amendment due process, adequate notice and a hearing in a meaningful manner at a meaningful time. [7] Therefore, Petitioners respectfully assert, that Article

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[6] *Marbury v. Madison*, 5 U.S. 1 Cranch 137 137, 163 (1803)("for it is a settled and invariable principle ... that every right, when withheld, must have a remedy, and every injury its proper redress." The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.")

[7] *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976)(requiring adequate notice and hearing at a meaningful time and in a meaningful manner). Grayned, supra.

III courts exceed their Constitutional-restraints on subject matter jurisdiction to (a) judicially-create an ambiguous *Montana* Indian doctrine, or (b) draft and issue a Rule 16 that (i) contains no mandatory provisions for an evidentiary hearing, (ii) and Rule 16(c)(2)(A) that has no clear definition as to what 'frivolous' means. Arguably, the rulings dismissing all Petitioners claims are void, and manifest injustice has resulted. Id. *Grayned.*

D. By Historical Analysis, Congress ordains Treaty-recognized Navajo Law as the 'Supreme Law of the Land'

By an exhaustive analysis, all branches of the United States, save this branch in *Montana* and its progeny, recognize only Navajo Nation authority is paramount within the Navajo Nation civilly over Indians and non Indians alike. **Congress' intentional silence says Federal courts can't hear Navajo claims**. In *U.S. v. Lara* 541 U.S. 193 (2004) 2004 U.S. LEXIS 2738,*14, this Court recognized Congress' power in Indian affairs is 'plenary and exclusive'. [8] Congress bars Federal Courts from hearing Navajo law claims by repeatedly refusing to give Federal Courts *any* authority over Navajo Nation civil claims, (28 U.S.C. §450)(P. App. 26a), never creating any ancillary or supplemental jurisdiction federal court powers, save *habeas corpus* relief, 25 U.S.C. §1303(P. app. 26a) [9].

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[8] See, *Lone Wolf v. Hitchcock*, 187 U.S. 553,565 (1903)(Plenary power is not in the Judiciary.)

[9] *Morton v. Mancari*, 417 U.S. 535, 551 (1974)("In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-government...".); *National Farmers Union Ins. Cos. v. Crow*

By all the expressions in law covered by 2005 *MacArthur*, *infra*, Congress has always expanded Navajo authority over its lands, (2005 *MacArthur* at 961-962), (fn. 1 supra) *never* restricting its civil authority over non Indians, and has never given the Federal Courts power to define the metes and bounds of Navajo Nation Court jurisdiction[10] by any 'implied divestiture' doctrine unmoored from all other law. Id.

Congress' expressions say State Courts can not hear Navajo law claims. Congress bars all state authority over and within the Navajo Nation by treaty, fn. 10 *supra*, and the Aneth Extension Act, and by pre-

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Tribe, 471 U.S. 845, 855-856, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10, (1987).

[10] Treaty –Statute Provisions: The Navajo Treaty of 1849 Article I, III, and IX;1848 Treaty of Guadalupe Hidalgo Article IX.(P. ap. 16a). The Navajo Treaty of 1868 Article X, expressly promises no further concessions will be taken from the Navajo Nation without approval of ¾ of the male Indian population. (P. app. 18a); Utah's Enabling act 'forever' disclaims authority or interest in the area. (P. Ap. 18a); 1933 Aneth Extension area (P. app.19a) as purchased from Utah with Navajo Tribal funds(P. app. 21a), as the 1937 appropriations act shows all surface rights, and a large percentage of mineral rights on state school trust lands, were added to the Navajo Nation. *See Pelt v. State of Utah*, 104 F.3d1534 (10th Cir.1996); *State of Utah v. Babbitt*,53 F.3d 1145, 1149 (10th Cir.1995)(noting Congress' clear intent that oil and gas development on the Aneth Extension benefit San Juan Navajos); *Williams v. Lee*, 358 U.S. 217, 221–222, 79 S.Ct. 269, 3 L.Ed.2d 51(1959); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172, n. 7, 175, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)(Congress prohibits checkerboarding of jurisdiction in the Navajo Nation citing 18 USC §1151, and 25 USC §§1322, 1324).*Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 690 (1965).

Montana and post-*Montana* statutes[11], (the legislative history is found in 2005 MacArthur). See, 25 U.S.C. §§1322 1324, 1326 (P. app. 25a-26a), among others, domestically executing Navajo Treaties, Courts, and law, into Domestic law as the "supreme law of the land.". [12] **Congress intends only Navajo Courts can hear Navajo claims.** The Navajo Nation Supreme Court properly interprets its law as the only

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[11] See, Indian Self Determination Act ('ISDA') 25 U.S.C. §§450 (a)(federal domination is destructive to Indian Nations)(P. app. 26a); 450l (model agreement mandating Indian Civil Rights Act equality and no state intrusions (Indian Civil Rights Act 'ICRA', 25 USC 1302(8) and 1322, 1324, 1326))(P. app.29a and 43a¶3); 450m-1, (if Navajo law jurisdiction is to change under its ISDA judicial program contract, the Navajo law makers must make the change.)(P. app.30a-31a); 450f (Congress insures all persons claiming injury by a ISDA contractor.)(P. app. 31a). See Navajo ISDA judicial program contract mandating Navajo law and ICRA apply within the Navajo Nation. (p. app.43a par. 3). See, 25 USC §3651(6) 2005 *MacArthur* at pg. 995 reversing *Montana*'s presumptions. BIA contract Navajo law defines jurisdiction: Navajo Nation Code, tit. 7, § 253(B) and 254 (1995). *Supra*

[12] *McCulloch v. Maryland*, 17 U.S. 316, 400-401 (1819), *United States v. Belmont*, 301 U.S. 324, 331-332 (1937)("Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning.")*Medellin v. Texas*, 552 U.S.)_____ *Medellin v. Texas*, 552 U.S. _____, 128 S. Ct. 1346; 170 L. Ed. 2d 190; 2008 U.S. LEXIS 2912, (holding that if there is an international treaty recognizing a court where the treaty is executed by Congress into domestic law, the Court actions, subpoena, summons, injunction, are fully binding), and while not binding, instructive for BIA contracted Indian Nations, *Cabazon Mission Band of Indians, v. Smith*, 2004 U.S. App. LEXIS 22772,*18 et seq;388 F.3d 691; *The Skull Valley Band of the Goshutes, et al v. Utah*, et al, 2004 U.S. App. LEXIS 16055,*42-43;376 F.3d 1223;58 ERC (BNA) 2099;198 A.L.R. Fed. 741

Congressionally-recognized authority in the Navajo Nation. [13]

> **Navajo Nation Code tit. 7, § 253 (1995)**
> '[t]he District Courts of the Navajo Nation shall have original jurisdiction over ....All civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation."

Id. emphasis added.

> **Navajo Nation Code tit. 7, § 254 (1995)**
> "Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians."

Id. emphasis added.

> **Navajo Nation Bill of Rights Art. 3**
> "Life, liberty and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law

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[13] See, Navajo Nation Supreme Court ruling in *Ford Motor v. Kayenta District Court*, SC CV-33-07 page 3-6. See, Westlaw and Navajo Nation Supreme Court website. http://www.navajocourts.org/NNCourtOpinions2008/Ford%20v.%20Kayenta.pdf

> shall not be denied...nor shall any person within its jurisdiction be denied eequal protection, ...nor be deprived of life, liberty, or property, without due process of law. " P. ap. 22a

By ***Montana*** there is no uniform predictable law. As applied in the *Dickson* referenced rulings below, confusion reigns by panel rulings, contrary to District Court findings, contrary to *prior* panel rulings, without *en banc* hearings, contrary to other Supreme Court rulings going in two directions[14]. Right now the

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[14] Very Conflicted Outcomes of Rulings below: (1) Most National insurance companies need not pay the victim (2002 *MacArthur I* *18) it lacks a contract with the victim. (2) There is no 'inherent' authority for Navajo Courts to directly discipline only non resident non-Indian Navajo Bar counsel *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991) 2002 *MacArthur I* *19-20. (3) Federal Courts can make new fact findings displacing the Navajo judge completely. (Id. and 2007 MacArthur III generally) (4) Petitioners can prevail in 2002 *MacArthur I* on the issues of (a) these Respondents are not the state (Id. fn. 5), but merely a political subdivision municipal corporation, without state sovereign immunity *Cook County v. Ex Rel Chandler*, 538 U.S. 119, 126 (2003), and (b) Respondents were violating Navajo law on multiple levels (Id. *3-6), for which there is no state sovereign immunity here, (c) state sovereignty is less than the inherent soveriegnty of the Navajo Nation who, unlike states, reserved to itself unlimited inherent authority (2002 *MacArthur* *13-14, *and fn. 5*) over all persons equally, within its borders. All the foregoing points are wholly reversed *without an enbanc hearing* by the 2007 *MacArthur III* panel (*MacArthur et al v. San Juan County et al*, 2007 U.S. App. LEXIS 17008,*32, 43-44, 52, generally;497 F.3d 1057) based upon an ever morphing *Montana* doctrine. (5) The 2002 *MacArthur I* can observe the Navajo case encompasses tort, Navajo common law, etc. Navajo law violations endangering an entire population and the Navajo Court itself, (2002 *MacArthur* *8-9), *and without an en banc hearing, the 2007 MacArthur decision*, generally, can address the case as basically an 'employment' matter and make Respondents

average time for resolving *Montana* Indian law jurisdictional cases is about ten years [[15]] or longer.

In a 9th circuit-referred Navajo tort law, Ford Motor case, the Navajo Nation Supreme Court Chief Justice Herbert Yazzie, in Navajo case, *Ford Motor v. Kayenta District Court* SC-CV-33-07 (fn. 13 *supra*), forthrightly asked Ford Motor's attorney in oral argument to the effect, (1) "How many dead Indians does it take before the Navajo Nation's Courts have jurisdiction?"; (2) to the effect, "Do these plaintiffs have

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immune by relying on *Colorado* state interpretations of 'police powers', citing to *Hill v. Colorado*, 530 U.S. 703, 715, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). (Id. *45), factually finding Respondents were seriously in some way enforcing a state law, when this Court recognizes *all state law authority* is barred within the Navajo Nation completely. [[14]]P. app. 25a-26a. (6) Land can be determined to be Navajo land, purchased by state and tribal agreement with tribal funds by federal statute (2005 *MacArthur at 961-62*), solely for Navajo beneficiaries, and without an en banc hearing, contrary proof, or oral hearing or discussion, the 2007 *MacArthur* at *52, court can declare the land is non Indian 'state land', presumably so as to fit within the latest *Montana* pronouncements from this Court, and eliminate *National Farmer* completely.

[15] *Nevada v. Hicks*, 533 U.S. 353 (2001) (ten year tribal state sovereignty dispute); *Ford Motor Company v. Todecheene*, 394 F.3d 1170 (9th Cir. 2005)(having been decided by the Navajo Court and settled after oral argument about 10 years); *Atkinson Trading Post v. Shirley*, 532 U.S. 645 (2001)(Indian/non Indian jurisdiction question 8 years); *Sinanjani v. Board of Education of San Juan County*, 10th Circuit Court, No. 99-4130 Nov. 30, 2000(several appeals involving a 25 year consent decree challenged by San Juan County School district and its duty to Navajo children taken from their homes to schools outside their Nation); *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818 (10th Cir. 2007) (State/Indian jurisdictional authority for taxing motor vehicles, nine years, three appeals.

any other courts into which they can go to receive redress?" The Ninth Circuit Court shared this same concern in oral argument in *Ford Motor Co. v. Todecheene*, 394 F.3d 1170 (9th Cir.2005)(self-vacated to allow *Nat'l Farmer*, *infra*, analysis) after the case came back to the 9th Cir. from the Navajo Supreme Court, whereupon Ford settled the case. The United States District Court in"2005 *MacArthur*" at fn. 135, sees a third. (3) ""If, Indians reasoned, justice is for society's benefit, why isn't our justice accepted?"

E. America Has Two Opposite Types of Indian Land and Indian Sovereigns

This Court in *Lara*, as Justice Thomas accurately observed, identified Indian law as "schizophrenic". Id. 2005 *MacArthur* III at 961-962 and fn. 105, in the finest, most exhaustive 263 page Indian law Court-analysis in American history, [16] found

> "Consistent with the court of appeals' mandate, this court has applied the *Montana* analysis in deciding the jurisdictional issues on remand. Yet the **drastic differences in historical context and current consequence** between the 1933 [Aneth extension] Act and the Crow Allotment Act necessarily raise the question whether *Montana'* s limited reading of the Crow Tribe's authority under its 1868 Treaty has any logical bearing upon the Navajo Nation's authority *under the 1868 Navajo Treaty* over the lands within its boundaries, particularly over parcels

[16] taking 2.5 years to research, draft, and issue by Judge Bruce S. Jenkins and his long time clerk Russell Kearl and staff.

> **that were purchased with Navajo trust funds** and **are still held in trust for the Navajo people of San Juan County**.... Viewed through the lens of the relevant Indian policy of the political branches in 1934, the *Atkinson* Court may have erred by importing *Montana's* "general principle" into the context of the Navajo Nation without examining the historical relevance of *Montana's* rationale."

Id. [17] emphasis added.

Congress intended, historically, two opposite types of Indian lands, and types of Indian Communities: (1) "280" *land* types [18], and at (*Montana* 565-566), '280' type Indian "tribes"[19]) historically Congress designed

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[17] See P. App. 21a for Aneth Extention act, P. App. 25a , for federal appropriations act showing Navajo Nation purchased all surface rights within the Utah addition to the Navajo Nation, leaving only some mineral rights to Utah, with all lands and other mineral royalties set aside only for the sole benefit of the Navajo people. Also the 1968 Aneth amendment. (P. App. 23a)

[18] (28 U.S.C. §1360) (Pub.L. No. 83 280 (1953) *Montana* at 545 Crow allotment and Allotment act (repealed 25 U.S.C. 331-333(repealed 2000).

[19] Limitations exceptions: Id.("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *[citations omitted]*.... A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [citations omitted]."

to be under some state authority; *versus* (2) "638" [20] lands (*Montana* at 558-559) [21] and Indian Nations promised, as for the Navajo, fn. 10 *supra*, 'forever', to be under *exclusive* federal authority. *Montana* at fn. 5. [22] *See* Navajo Nation Supreme Court in *Kayenta*, *supra*. Further, *Montana* limitations were not initially intended to be a blanket policy for all Indian Nations as

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[20] (Pub.L. 93-638)(Indian Self Determination and Education Assistance Act "ISDA")

[21] Id. at 558-559....) ("The treaty, therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe the authority to control fishing and hunting on those lands.[fn omitted]. But that authority could only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation." Id. at 558-559....).

[22] Id. at fn. 5 . "Under the Choctaw treaty, the United States promised to convey new lands west of the Arkansas Territory in fee simple, and also pledged that "no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . **and that no part of the land granted to them shall ever be embraced in any Territory or State.**" Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-334, quoted in *Choctaw Nation v. Oklahoma*, 397 U.S. at 397 U. S. 625. In 1835, the Cherokees signed a treaty containing similar provisions granting reservation lands in fee simple and promising that the tribal lands would **not become part of any State** or Territory. *Id.* at 397 U. S. 626. In concluding that the United States had intended to convey the riverbed to the Tribes before the admission of Oklahoma to the Union, the *Choctaw* Court relied on these circumstances surrounding the treaties and placed special emphasis on the Government's promise that the reserved lands would never become part of any State. *Id.* at 397 U. S. 634-635. Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868."

it was a narrow fact bound case. [23] This Court previously found that Congress never intended these '638' Nations to be under federal court doctrines' domination. Fn. 9 *supra*. (28 U.S.C. §450 P. app. 26a). The Navajo Nation is a '638' Nation with a ISDA judicial program contract, P. app. 43a par. 3, the President says executes into domestic law, (P. app. 31-32a) the 1992 Senate-ratified United Nations International Covenant on Civil and Political rights (P. app. 28a) (UNICCPR) (P. App. 27a-28a). The President, Senate, and Congress have acted in such away that now the question of the metes and bounds of Navajo jurisdiction, is within the Navajo Nation itself, by BIA and Navajo mutual agreement, now ratified in an International Treaty, as executed into domestic law by the ISDA and the Navajo Nation-BIA judicial program contract. (P. Ap. 43a-44a).

Justice Thomas is quite correct finding Indian law is 'schizophrenic' (*Lara*, *supra*, J. Thomas concurrence) because '280' 'tribal' limits, are put on '638' Nations. Partially because some Nations came into the United States under terms of a foreign Treaty of Guadalupe Hidalgo, (P. Ap. 15a), that set parameters on what authority Indian Nations would be under. Navajo Treaty of 1849 (P. Ap. 16a). This conflict may be resolved by this new International Treaty designed to execute into Article VI status (a) a re- confirmation of Navajo Treaties retention of civil authority equally

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[23] *Jicarilla Apache Tribe v. Supron Energy Corp.* 728 F.2d 1555, 1571 n.6 (10th Cir. 1984)
(Seymour, J., dissenting in part), *adopted as opinion en banc*, 782 F.2d 855 (10th Cir.), *cert. denied*, 479 U.S. 970 (1986) finding *Montana* was a narrow 'fact bound' case.

over all persons, to protect and preserve America's aboriginal self-governance and self- determination, and (b) the 5th Amendment and 14th amendment Due Process rights protections, over and above all other Constitutional provisions, without exception of any party 'status'. Now, all Indian Nations meeting ISDA criteria qualify for '638' status. Fn. 12, *supra.*

F. *A New International Treaty Fully Executed Domestically Appears to Make the 5th Amendment's Due Process and the 14h Amendment's Equal Protection And Indian Treaties, Article VI "Supreme Law of the Land"-without exceptions*

In *McCulloch v. Maryland*, 17 U.S. 4 Wheat. 316 316, 405-406 (1819) 1819 U.S. LEXIS 320,*62;17 U.S. 316; 4 L. Ed. 579;4 A.F.T.R. (P-H) 4491, a State citizen sued Maryland for a law it passed under the Federal Constitution. . The *McCulloch* Court identified the power of Article VI and how all states fully agreed to it. *Id. McCulloch* *116-117, also identified that conflicts "must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made." Id. Since 1819 the Court has enacted a broad variety of judicially-created doctrines that close the Federal Court-room doors to America's citizens, some based on 10th or 11th immunities, and now, *Montana* is yet another and the ambiguous Rule 16 is yet another, contrary to Article VI's federal pre emption. Fn. 12, *supra. Lara, supra,* acknowledged Congress' power to execute all treaties. *Lara* dealt with a Indian tribe's *criminal* jurisdiction over Indian nonmembers. Id. *Lara,* did not address *Montana*'s judicially-created doctrine that bars Indian

Nation Courts from having *civil* jurisdiction over non Indian non residents, as it applies to '638' Indian Nations. *Lara* did not address the new 1992 Senate-ratified United Nations International Covenant on Civil and Political Rights (P. app. 28a) (UNICCPR), a Treaty signed by the United States President, ratified in 1992 by the Senate, and Congressionally-executed into law. [24] Articles 1 and 26.

> "**ARTICLE 1 sec. 1**
> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> **ARTICLE 26**
> All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Id. emphasis added.

None of the Court's rulings below address this Treaty, though raised. **UNICCPR's Article 1**, is

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[24] See, 42 U.S.C. §1983, and Indian Civil Rights Act ("ICRA") 25 U.S.C. 1301-1326, (P. ap. 24-26a) and the Indian Self Determination and Education Assistance Act ("ISDA") 25 U.S.C. 450 et seq. (as greatly amended in 1994 and thereafter)(P. app. 26a-30a)

executed into domestic law by the Indian Self-Determination and Education Assistance Act ("ISDA") self-governance contract project (of which the Navajo Nation and its judicial system is part) as executing, effecting now, the BIA-reported about 200 Indian Nations in the project. See, President's State Department reports to the U.N. of 1994 (P.Ap.33-34) declaring this Treaty to be fully domestically executed.

UNICCPR's Article 26, executed into domestic law by the pre existing 5th and 14th Amendments and by all of Congress' Civil Rights Acts (42 U.S.C. §1983, 28 U.S.C. §1343) and Indian Civil Rights Act (25 U.S.C. §§1301-1326), now by Treaty expressly allows for *no* exceptions or immunities based on any 'status' of any parties. See, President's state department report on "Implementation" (P.ap. 34a)(preexisting law executes this Treaty.) Article VI states, Treaties are the "Supreme Law of the Land", "anything in the Constitution or laws of any State to the contrary notwithstanding." The President, Senate, and Congress arguably have now re-affirmed, re- ratified, and executed into domestic law the very brilliant vibrant light of hope, reduced to the 'great law' 'All men are created equal' with 'inalienable' rights as in our Declaration of Independence, and 5th and 14th amendments, by Article VI Treaty law without *any* exceptions for the defendants' status, as not only U.S. and Navajo, but international policy binding all the U.S., Navajo, and state courts, domestically (P. Ap. 41a-43a). Fn. 12, *supra*.

G. Under Article VI, Full Enforcement of Navajo Court Orders is a Duty, not Discretionary Authority

Rulings below would not enforce Navajo rulings based on 'comity'. 2007 *MacArthur* III, 2007 U.S. App. LEXIS 17008,*1;497 F.3d 1057. Based on the historical statutes executing the Navajo Treaty of 1849 and 1868 (P. app. 16a-17a) into domestic law, (fn. 10, *supra*) and now based on the UNICCPR, Article 1 and 26, as executed by the ISDA self governance contract program, as the President states, (P. App. 33a-34a), the Navajo Nation law and its own jurisdictional definitions, are Treaty- recognized Courts, as executed into domestic law, and by a mutual executive agreement, that is also executed by a statute (model ISDA agreement 450l) (Navajo judicial agreement P-Ap. 43a). *Medellin* holds such Courts and their actions are the 'supreme law of the land', domestically binding throughout the United States. Id. See, *Lone Wolf v. Hitchcock*, 187 U.S. 553,565 (1903)(Plenary power is not in the Judiciary.) *Dames & Moore v. Regan*, 453 U. S. 654, 680-681(1981); *United States* v. *Belmont*, 301 U. S. 324, 330 (1937).

Notably, there is no record of Federal Courts having 'justice' concerns when non Indians enjoy Navajo justice as against Indians, it is only when the non Indian is on the receiving end that unsubstantiated fears of unfairness arise. With an estimated 11 million non members entering the Nation annually, an area the size of 4 or 5 eastern states, who can injure others or be injured, anything less than full enforcement of these orders destroys Congressionally- intended self governance and self determination of the Navajo

Nation. With Congress making no other sovereigns' courts available, an entire body of Plaintiffs has no place to go, ripe targets for those who would intentionally harm them, exactly as here, by Respondents claiming immunity because most of them are "non Indians", now morphing into them becoming suddenly state employees enforcing state law, for the first time since Lord Coke in England [25]. 2007 *MacArthur* at *43. Given the UNICCPR and Article VI, Navajo Treaty issues are outside state policy concerns as Congress bars state authority in the Navajo Nation expressly. Fn. 9 *supra.* If these Respondents were a 'state', they waived sovereign immunity when they fully litigated false Navajo common law claims with Navajo Bar counsel and live and present witnesses for examination and cross examination, in a 19 hour evidentiary hearing, *unlike* New Mexico counterclaiming ONLY sovereign immunity in another case.[26] Congress insures those harmed by the ISDA contractors. 25 U.S.C. §450(f).(P. App. 31a) Under the UNICCPR as executed, and Article VI, the 10th and 11th amendments cannot trump treaties or the 5th amendment.

REASONS FOR GRANTING THE PETITION

There are (6) arguments for granting this Petition. Based on the foregoing, (1) **Manifest injustice.** 5th Amendment restraints on Article III courts are violated here and for every like-situated

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[25] *Cook County v. Ex Rel Chandler*, 538 U.S. 119, 126 (2003).(municipal corporations are not the state)

[26] *Mescalero Apache Tribe v. State of N.M.*, 131 F.3d 1379 (C.A.10 (N.M.), 1997). 2005 *MacArthur* at 1041-1042.) *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, (10 th Cir. 1999).

Plaintiff seeking relief in Navajo and Federal courts. **(2) National Importance**. This Court only accepts about 80 petitions a year. The rulings below unless reversed deprive all persons of all access to Due Process *anywhere*. **(3) The case is a subject matter jurisdiction challenge case**. It must be addressed, and can "be raised at any time" as structural authorities are involved. *Freytag v. Commissioner*, 501 U.S. 868 (1991). **(4) Uniformity in the law will be produced.** The foregoing-identified (a) splits between this Court and Congress, and (b) splits between this Court and the 5th amendment, and (c) splits between this Court with prior Supreme Courts [27], all result a *de facto* policy of 'justice' on a case by case, judge by judge basis, that *Marbury*, intensely vilified as the antithesis of our Constitution, and now the antithesis of the International adopted 5th amendment standards Congress makes binding on all U.S. tribunals under the UNICCPR and Article VI. **(5) Splits in the Circuits need resolution**. The Navajo Nation is divided into two parts, *(Ariz.) 9th cir.* (allowing *National Farmer's* tribal exhaustion) and *(N.M. & Utah) 10th Cir.* using *Montana* to eliminate *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855-856, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) exhaustion *and* analysis entirely, contrary to the 2002 *MacArthur* panel. 2007 *MacArthur* *18 *supra* as upheld in *Dickson*. Full enforcement of '638' type Indian Nation orders is split [28] unless Article VI federal preemption applies. See,Fn.

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27 *See, Nevada v. Hicks*, 533 U.S. 353, 376, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (Souter, Kennedy & Thomas, JJ., concurring) cited in 2005 *MacArthur* at 231.

28 *Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55, 65 (1909); *Embry v. Palmer*, 107 U.S. 3, 9 (1883) (looking at the 1804 amendments to the original 1790 act finds the statute "must be taken to mean,

12 *supra*. **(6) Collateral Damage won't be possible if this Petition is accepted**. While not directly a petitioners claim here, this Court should be aware of all the ramifications of these issues. In a separate case below,[29] the Utah State Bar is combining the federal abstention doctrine of *Middlesex County Ethics Committee v. Garden State Bar Association* 457 U.S. 423, (1982), with the well entrenched *Montana* doctrine and Rule 16(c)'frivolous' ambiguities, to say there are 'no good faith arguments' this attorney can make...ongoing here for about 5 -6 years. So, it is usurping the Federal Court's inherent authority to discipline this attorney, in the first instance, *non* reciprocally, based upon this *pre-existing* heated political federal case where the Federal Judges *repeatedly* denied opposing counsel's motions for sanctions, discipline, costs. (P. app.11a, 13a-15a).[30] The Bar collateral attack on this solo attorney, in her first complaint-until-now filed case, was initiated by Bar-complainant opposing-counsel Carolyn Cox *during* this litigation, that no court is stopping. The process is under Utah Rules of Lawyer Discipline and Disability failing entirely to meet numerous U.S. Constitutional

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such faith and credit as they are entitled to in the courts of the state, territory, or ***other country*** *subject to the jurisdiction of the United States from which they are taken.*"); *United States ex rel. Mackey v. Coxe*, 18 How. 100, 103 (1856) and *Standley v. Roberts*, 59 F. 836, 845 (CA8 1894), appeal dismissed, 17 S. Ct. 999, 41 L. Ed. 1177 (1896). 8th Cir. is the predecessor of the 10th cir. 2007 MacArthur III reverses without an *enbanc* hearing.

[29] See, Utah 3rd District court case 070917445, In re discipline Susan Rose, and 10th Cir. case 10-4000 (Rose v. Utah) (facing a motion to dismiss at this time.).

[30] The Bar matter also includes a 'state' case involving Navajo Nation jurisdiction, the Utah Court of Appeals observed lacked subject matter jurisdiction.

standards, ostensibly the 11th amendment allows an immunity from adhering to, based on more immunity doctrines. Cf. *Taylor III, v. Kentucky State Bar Association*, 424 F.2d 478 (6th Circuit 1970); *Hawaii Housing Auth. V. Midkiff*, 467 U.S. 229 (1984).

Final Summary

For one quiet moment, just imagine yourself as an attorney on Main Street, U.S.A. A like-situated Plaintiff as these Petitioners, with *intentional civil Navajo or Federal law* injuries, for him/her and for an entire group of persons threatened with losing their lives or professional livelihood, names and reputations, comes to you for advice as to what to do. You are fully aware of all the rulings below outcomes. What counsel would you give the Plaintiff? Will the Plaintiff consider 'self help' or, possibly, suicide by your answer? Accepting this Petition places the World and all Americans, Indian and non Indian alike, on clear notice, that if you do business, work, live in America, or live, work travel in the Navajo Nation in America, the Court room doors are wide open, with clearly defined rules, fully enforceable orders, decrees, judgments, and equal access to adequate notice of fair standards, at a meaningful time and in a meaningful manner, before a Congressionally- recognized tribunal...*without* exceptions for status of any parties. America's Public Policy has arguably destroyed the policy of 'separate but equal' that never worked for schools, buses, and now Courts. Given the choice between the other two Branches Treaty-executed public policy, and this Court's doctrines and rules, these Petitioners respectfully plead for this Court to choose as it did in *Lara*, and give all persons a level playing field to access

peaceful resolution of their injuries in all the United States Courts.

CONCLUSION

For all the foregoing reasons, this Petition should be accepted.

Respectfully Submitted.

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(any footnotes trail end of each document)
No. 08-4148

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALISON DICKSON; DONNA SINGER; FRED RIGGS,
Plaintiffs-Appellants,

and

MICHELLE LYMAN; HELEN VALDEZ; STEVEN MACARTHUR; NATHANIEL PENN; CANDACE LAWS; LINDA CACAPARDO; SUE BURTON; AMY TERLAAK; CANDACE HOLIDAY; NICOLE ROBERTS,
Plaintiffs,

v.

SAN JUAN COUNTY; SAN JUAN HEALTH SERVICES DISTRICT; J. TYRON LEWIS, Commissioner; BILL REDD, Commissioner; CRAIG HALLS; REID M. WOOD; CLEAL BRADFORD; ROGER ATCITTY; JOHN LEWIS; JOHN HOUSEKEEPER; KAREN ADAMS; PATSY SHUMWAY; JAMES D. REDD; L. VAL JONES; MANFRED R. NELSON; RICHARD BAILEY; MARILEE BAILEY; ORA LEE BLACK; GARY HOLLADAY; LORI WALLACE; CARLA GRIMSHAW; GLORIA YANITO; JULIE BRONSON; LAURIE SCHAFER; LYN STEVENS, San Juan County Commissioner,
Defendants-Appellees.

December 10, 2009, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

JUDGES: Before TACHA, ANDERSON, and EBEL, Circuit Judges.

ORDER AND JUDGMENT *

Plaintiffs-Appellants Dickson, Riggs and Singer (hereafter "Appellants") appeal from the district court's order denying their motion for relief from this court's final judgment. The district court ruled that the law-of-the-case doctrine prohibited it from considering Appellants' new legal theories that a Navajo Nation tribal court had subject-matter jurisdiction over defendants, notwithstanding this court's decision to the contrary. The court's order also granted defendants' motion to enjoin Appellants from initiating any further proceedings against them. We affirm.

Background. The factual background of this case is undisputed and is thoroughly set forth in this court's prior decision. *MacArthur v. San Juan County*, 497 F.3d 1057, 1060-1064 (10th Cir. 2007) (hereafter, "*MacArthur III*"). Thus, we set forth only the procedural background necessary to resolve this appeal. [1] Appellants and other plaintiffs filed a complaint in the Navajo Nation tribal court against defendants San Juan County; San Juan Health Services District ("SJHSD"); and numerous county officials, trustees and employees of those entities (hereafter "Defendants"). Plaintiffs' claims pertained to their employment at the Monte-

zuma Creek Health Clinic, operated by the SJHSD and located in San Juan County, Utah, within the exterior boundaries of the Navajo Nation. Some, but not all, of the plaintiffs were members of the Navajo Nation. Only one of the Defendants, Mr. Atcitty, was a tribal member. In December 1999, the Navajo tribal court entered a sweeping preliminary injunction against the Defendants. [2]

– *MacArthur I and II.* Plaintiffs sought to enforce the tribal court's injunction and related tribal court orders by filing suit in federal district court, seeking a declaratory judgment and a preliminary injunction. But the district court ruled that it was prohibited from enforcing the tribal court orders because Defendants enjoyed sovereign immunity from suit in tribal court, and it dismissed plaintiffs' complaint. On appeal, we remanded the matter to the district court, directing it to conduct an analysis of the tribal court's adjudicative authority over Defendants in accordance with *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), before it addressed the sovereign immunity issue. *MacArthur v. San Juan County*, 309 F.3d 1216, 1227 (10th Cir. 2002) (hereafter "*MacArthur I*"). The district court did so, and ultimately again granted judgment in favor of Defendants. *MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 1056-57 (D. Utah 2005) (hereafter "*MacArthur II*").

-- *MacArthur III.* On appeal, a panel of this court ruled that the federal courts must not recognize the tribal court orders because the Navajo tribal "court lacked subject matter jurisdiction (i.e. adjudicatory authority) over nearly all of Defendants' activities." *MacArthur III*, 497 F.3d at 1067. We first rejected plaintiffs' argument that the federal court lacked authority to do any-

thing but enforce the tribal court orders. We ruled that the question of whether a tribal court has regulatory and adjudicatory authority, and thus whether a federal court can enforce a tribal court order, is a matter of federal law giving rise to subject-matter jurisdiction under 28 U.S.C. § 1331. *Id.* at 1066.

We then began our analysis of the merits with *Montana*, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493, "the pathmarking case concerning tribal civil authority over nonmembers." *Strate v. A-1 Contractors*, 520 U.S. 438, 445, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997). *Montana* held that, as a general rule, "'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'" *MacArthur III*, 497 F.3d at 1068 (quoting *Montana*, 450 U.S. at 565). *Montana* recognized two "narrow exceptions" to that general presumption: (1) a "'tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements'"; and (2) a "'tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* (quoting *Montana*, 450 U.S. at 565-66).

Applying *Montana's* general rule and two exceptions to the facts relevant to each plaintiff and each defendant, this court ultimately ruled that *Montana's* general presumption against tribal civil jurisdiction applied to all Defendants except one, Mr. Atcitty. Consequently, we held that Defendants' employment activities were beyond the regulatory and, therefore, adjudicative, au-

thority of the Navajo Nation. *MacArthur III*, 497 F.3d at 1070-1076. [3] The Supreme Court denied certiorari review. *MacArthur v. San Juan County*, 552 U.S. 1181, 128 S.Ct. 1229, 170 L. Ed. 2d 62 (2008).

Rule 60(b) Motion. Following *MacArthur III*, Appellants filed numerous motions in federal and tribal court seeking to avoid the *MacArthur III* decision. At issue in this appeal is Appellants' Federal Rule of Civil Procedure 60(b) motion asking the district court to alter the holding of *MacArthur III*, particularly its reliance on the legal precedents set forth in *Montana*. In a detailed and scholarly published decision, the district court denied the Rule 60(b) motion. *MacArthur v. San Juan County*, 566 F. Supp. 2d 1239, 1251 (D. Utah 2008) (hereafter "*MacArthur IV*"). It discussed Appellants' new legal theories, but held it was prohibited under the law-of-the-case doctrine from reconsidering the issues answered by *MacArthur III*. It also granted a permanent injunction against Appellants and their attorneys from proceeding in any forum to relitigate the questions of jurisdiction, immunity and enforceability of tribal court orders already decided by the Tenth Circuit in *MacArthur III*. *Id.*

In their Rule 60(b) motion, Appellants "canvasse[d] the treaties and statutes defining the legal relationship between the United States and the Navajo Nation" and argued that there is no express legal basis supporting *Montana's* presumption that tribal courts generally lack civil jurisdiction over nonmembers. *MacArthur IV*, 566 F. Supp. 2d at 1242. Appellants also argued that the federal courts lack authority to decide the Navajo Nation's jurisdiction in the first place. They further asserted that the federal courts could not decide the question of the Navajo Nation's adjudicatory authority in

this case because the Navajo Nation was not a party to the litigation. Further, they argued that because the Navajo Nation had entered into a contract with the Bureau of Indian Affairs (BIA) concerning its judicial programs, pursuant to *Medellin v. Texas*, 129 S.Ct. 360, 171 L. Ed. 2d 833 (2008), its tribal courts were "executive agreement claims settlement courts whose acts are entitled to full force and effect in the courts of the United States." *MacArthur IV*, 566 F. Supp. 2d at 1247 (quotation marks omitted).

In its exhaustive decision, the district court recited the history of the relevant legislation and Supreme Court decisions preceding and culminating in *Montana's* holding that tribal courts have very limited civil authority over nonmembers and nonmember activities within tribal boundaries. *Id.* at 1242-44. It acknowledged that scholars and even some members of the Supreme Court dispute the rule and reasoning of the *Montana* decision. *Id.* at 1249. Nonetheless, it ruled that the Supreme Court's decision in *Montana*, which continues to be followed by the Court, is binding on all lower federal courts, including it and the Tenth Circuit. *Id.* at 1245. The district court further ruled that the Navajo Nation was not a necessary party to the determination of the jurisdictional issues in this case, distinguishing cases relied upon by Appellants in which the litigation was against the tribe itself. *Id.* at 1245-46. The court explained that, by bringing an action in federal court seeking enforcement of the tribal orders, Appellants had invoked the federal court's jurisdiction under § 1331, including its authority to decide the tribal court's subject-matter jurisdiction over the Defendants. *Id.* at 1246-47. Finally, it ruled that the Navajo Nation's contract with the BIA was nothing more than a contract to

provide financial assistance, and it did not alter or supercede any of the relevant legislation or judicial precedent concerning tribal civil authority over nonmembers. *Id.* at 1247-48. Ultimately, the district court ruled that Appellants' arguments as to the tribal court's jurisdiction and the federal court's authority to resolve those issues had been answered by *MacArthur III*, and, thus, under the law-of-the-case doctrine, the district court lacked any authority to deviate from the Tenth Circuit's mandate. *Id.* at 1250-51.

Analysis. Appellants argue on appeal, as they did before the district court, that "[t]his case presents an opportunity . . . to eliminate the *Montana* doctrine from application to the Navajo Nation and . . . mak[e] Navajo law the 'Supreme Law of the Land[,]' binding on all Courts domestically." Opening Br. at 5. They contend that (1) all of the federal court decisions in this case were in excess of their constitutional Article III authority and, therefore, are void; (2) Congress and the Executive Branch have entered into treaties with the Navajo Nation, such that all Navajo Nation tribal court actions are binding on the federal courts, pursuant to *Medellin*, 129 S.Ct. 360, 171 L. Ed. 2d 833; and (3) they were denied due process by not being allowed to litigate the applicability of the *Montana* doctrine before it was mandatorily applied by the Tenth Circuit in *MacArthur I*.

Appellants' lengthy and novel legal theories set forth in their Rule 60(b) motion and their opening brief all seek, quite simply, to relitigate the very same questions already addressed by this court in *MacArthur III*: namely, did the tribal court have subject matter jurisdiction over the nonmember Defendants in this matter, and do the federal courts have jurisdiction to answer

this question. This court has answered both questions, ruling that the tribal court *did not* have jurisdiction over the nonmember Defendants and that the federal courts *do* have jurisdiction to determine that issue.

Appellants are simply arguing that the *Montana* and *MacArthur III* decisions were error. *Montana* has not been overruled, *see Plains Commerce Bank v. Long Family Land and Cattle Co. Inc.*, 128 S.Ct. 2709, 2719-20, 171 L. Ed. 2d 457 (2008), and *MacArthur III* is both a published decision of this court and the final decision in this case. "[T]his panel is bound to follow the decisions of the Supreme Court and the published decisions of this court." *Tootle v. USDB Commandant*, 390 F.3d 1280, 1283 (10th Cir. 2004). More specifically, the district court and this panel are precluded by the law-of-the-case doctrine from revisiting the issues decided in *MacArthur III*.

Under the law-of-the-case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983). Under this doctrine, "both district courts and appellate courts are generally bound by a prior appellate decision in the same case." *Alphamed, Inc. v. B. Braun Medical, Inc.*, 367 F.3d 1280, 1285-86 (11th Cir. 2004). "It is a rule based on sound public policy that litigation should come to an end . . . by preventing continued re-argument of issues already decided." *Gage v. Gen. Motors Corp.*, 796 F.2d 345, 349 (10th Cir. 1986) (internal citations omitted). If it were not for the law-of-the-case doctrine, "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances

from changes in its members." *Roberts v. Cooper*, 61 U.S. 467, 481, 15 L. Ed. 969 (1857).

We cannot find anywhere in Appellants' sixty-two page opening brief or fifty-three page reply brief where they even contend the district court erred in denying their Rule 60(b) claims under the law-of-the-case doctrine. The only time Appellants even acknowledge this doctrine is in an argument in their reply brief headed, "The Law of the Case Being Navajo Law Supports These Plaintiffs." Reply Br. at 20. There, Appellants simply make the circular argument that one aspect of the holding of *MacArthur I*–remanding the case to the district court to address the *Montana* doctrine in the first instance–should be deemed the law of the case, ostensibly in an erroneous belief this would enable them to continue challenging the *Montana* doctrine.

The law of the case as determined in *MacArthur III* continues to control this matter. Thus, the district court did not err in following the rulings of this court that *Montana* controls the legal analysis of the jurisdictional issues and, applying *Montana*, that the tribal court lacked subject-matter jurisdiction to exercise civil authority over the conduct of the nonmember Defendants. Accordingly, we affirm the district court's denial of Appellants' Rule 60(b) motion.

Injunction. In its order, the district court granted Defendants' motion to permanently enjoin Appellants Singer, Riggs and Dickson, individually and through their counsel of record, from seeking to enforce certain orders issued by the Navajo tribal court in any judicial proceeding before any court as against any of the Defendants, and it permanently enjoined these Appellants from prosecuting any claim for damages or other relief

in tribal court against the Defendants over whom the *MacArthur III* decision determined the tribal court lacked subject-matter jurisdiction. *MacArthur IV*, 566 F. Supp. 2d at 1251. We cannot find any place in Appellants' opening brief or even their reply brief where they challenge that ruling. "Issues not raised in the opening brief are deemed abandoned or waived." *Coleman v. B-G. Maint. Mgmt. of Colorado*, 108 F.3d 1199, 1205 (10th Cir. 1997). Accordingly, the district court's injunction against Appellants is affirmed.

Defendants' Rule 38 Request. Defendants request that we find Appellants' appeal to be frivolous and to award damages to the Defendants pursuant to Fed. R. App. P. 38. Rule 38 empowers this court to "award just damages and single or double costs to the appellee" if we determine that an appeal is frivolous.

We are very mindful of the extreme expense and time imposed on the Defendants by Appellants' repeated arguments challenging the same issues already litigated in *MacArthur III*. There is a strong argument for the imposition of Rule 38 damages against Appellants for their endless attempts to relitigate the same matters previously decided by this court. Nonetheless, we also note that the district court spent considerable time and effort to address Appellants' arguments, and in so doing, concluded that, while barred by the law-of-the-case doctrine, at least some aspects of their arguments were not frivolous. *See MacArthur IV*, 566 F. Supp. 2d at 1245 n.2. We respect the district court's opinion in this matter, and we greatly appreciate the patient and laborious effort undertaken by the district court in issuing such a thorough decision. We therefore deny the Defendants' request for damages

Nonetheless, we cannot emphasize to Appellants strongly enough that this matter is at an end. We caution Appellants that if they file any future appeal or other motion or filing in this court seeking to relitigate any issue in this case, the filing may be summarily dismissed and Appellants may be subject to the imposition of sanctions, including damages and filing restrictions, if the filing is found to be frivolous.

The district court's denial of Appellants' Rule 60(b) motion and its permanent injunction issued in *MacArthur IV* are AFFIRMED. Appellants' motion to certify to the Supreme Court the question of the binding effect of the Navajo Nation's tribal court's orders is DENIED. Defendants' requests for damages under Rule 38 are DENIED. Defendants' combined motion to dismiss this appeal under Federal Rule of Appellate Procedure 27 and Tenth Circuit Rule 27.2, is DENIED as moot.

Entered for the Court

Stephen H. Anderson

Circuit Judge

Footnotes

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1 Even this procedural recitation is streamlined. For example, in prior related actions, Appellants and other plaintiffs brought numerous state and federal law claims against the same defendants in federal court. In a 112-page decision, the district court dismissed the majority of the claims under Federal Rule 16 and declined to exercise supplemental jurisdiction over the remaining claims. *MacArthur v. San Juan County*, 416 F. Supp. 2d 1098, 1208-10 (D. Utah 2005). This court dismissed the appeal as frivolous. *MacArthur v. San Juan County*, 495 F.3d 1157, 1158 (10th Cir. 2007).

2 The tribal court ordered Defendants to reinstate Ms. Singer and Mr. Riggs to their employment positions; offer Ms. Dickson full time employment; expunge plaintiffs' disciplinary record; refrain from requiring physician assistants to maintain time cards; and pay all of plaintiffs' attorney fees and expenses. *MacArthur III*, 497 F.3d at 1062. It further prohibited Defendants from eliminating or interfering with certain medical services provided by the health clinic. *Id.*

3 We exercised our discretion to refuse to enforce the tribal court judgment as to those claims asserted against defendant Atcitty, over which the tribal court arguably had subject-matter jurisdiction. *MacArthur III*, 497 F.3d at 1076.

Civil No. 2:00-CV-554BSJ
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

DR. STEVEN MACARTHUR, et al., Plaintiffs,
VS.
SAN JUAN COUNTY, et al., Defendants.

ORDER RE: PLAINTIFFS' MOTION FOR LEAVE TO FILL APPLICATION FOR AN IMMEDIATE SPECIAL WRIT (28 U.S.C. § 1651)

Plaintiffs' counsel's motion for permission to file a motion pursuant to 25 U.S.C. § 1651 for issuance of an immediate special Writ in aid of this court's jurisdiction, and related relief, filed February 17, 2009 (dkt. no. 1025), is DENIED.

Absent a showing of bad faith, harassment, or some other extraordinary circumstance, the propriety of a State bar proceeding before a State tribunal is not an appropriate subject for federal court interference as to subject, scope and evidence. See Middlesex County Ethics Comm. v. Garden State Bar Assn, 457 U.S. 423, 431-37 (1982). Such a proceeding is not the same as a federal disciplinary proceeding before a federal tribunal. While a federal disciplinary mechanism exists concerning the conduct of members of the bar of this court, see DUCivR 83-1.5.1 through 53-1.5.5, that process has not been invoked in the context of this litigation.

Civil No. 2:00-CV-554BSJ
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

DR. STEVEN MACARTHUR, et al., Plaintiffs,
VS.
SAN JUAN COUNTY, et al., Defendants.

On June 11, 2008, plaintiffs Singer, Riggs and Dickson filed a motion for temporary restraining order and other extraordinary or equitable relief (dkt. no. 996), with respect to a proceeding now pending in state district court and involving plaintiffs' counsel and the Utah State Bar's Office of Professional Conduct.

Having reviewed the plaintiffs' motion and memorandum, it appears that plaintiffs' counsel misapprehends the nature of this court's May 12, 2008 bench ruling, now set forth in written form in a Memorandum Opinion and Order filed today. Nothing about the equitable relief granted by this court forecloses plaintiffs' counsel from presenting any argument in defense of her conduct in representing these plaintiffs in this proceeding in the separate proceeding now pending before the state district court.

"All attorneys admitted to the bar of this court are subject to the disciplinary jurisdiction of this court," DU ivR 834.5(a)(1), and generally, questions involving the professional conduct of attorneys admitted to the Bar of this court that arise in proccedings before this court are matters for this court to consider in the first instance, following the procedure prescribed by this court in its own local Rules. See DUCivR 83-:1.5(h).

Be that as it may, the threatened injury alleged in the plaintiffs' moving papers that may result from the pending state court proceeding appears to be injury to plaintiffs' . counsel individually, and not to the plaintiffs themselves. In the context of this 'case, plaintiffs Singer, Riggs and Dickson thus lack standing to seek preliminary injunctive relief as to the pending state court proceeding involving their counsel and the other nonparties named in the pending motion. The proper parties to a proceeding for such equitable or extraordinary relief are not before this court.

Consequently,

IT IS ORDERED that Plaintiffs } "Rule 65 and U.S.C. 1651 Application for a Temporary Restraining Order and Order to Show Cause Why a Preliminary or Permanent Injunction Should Not Issue" (dkt. no. 996), is hereby DENIED in all respects.

1. 1848 Condition of land purchase from Mexico, Treaty of Guadalupe Hidalgo of 1848 Art. XI,

> "... [s]pecial care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain." Emphasis added

2. 1849 The self-executing Navajo NationTreaty of 1849 sec. I, III, and XI states the United States

> "I. ... the said tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection." Emphasis added.
>
> "III. The Government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajos [not only tribe but individuals] it is agreed that the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid Government, shall have the same force and efficiency, and shall be as binding and as obligatory upon the said Navajos, and executed in the same man-

ner, as if said laws had been passed for *their sole benefit* and protection;... " emphasis and [ ] added.

"XI....this treaty is to receive a liberal construction, at all times and in all places, to the end that the said ***Navajo Indians shall not be held responsible for the conduct of others***, and that the Government of the United States shall so *legislate* and act as to secure the **permanent prosperity and happiness of said Indians."** Emphasis added.

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3. 1868 The Navajo Nation Treaty of 1868

"**ARTICLE 2.** The United States agrees that the following district of country, to wit: bounded on the north [land description metes and bounds omitted].... is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that *no* persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the Government, or of the Indians, as may be author-

ized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in the article."

ARTICLE 10. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe *of his rights* to any tract of land selected by him provided in article 5 of this treaty." Emphasis added.

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4. 1894 Congress passes Utah's 1894 Enabling Act.

"Sec. 3...Second. That the people inhabiting said proposed State do agree and declare that they *forever disclaim* all right and title to .... all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the

United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress..." emphasis added.

5. 1933 The 1933 Aneth Extension Act Chapter 160, March 1, 1933.|[H.R. 11735.] 47 Stat., 1418, wherein the Navajo Nation purchases and obtains by Congress and Presidential action, *all surface rights* and shares mineral royalties between Utah and the Navajo Nation.

> "An Act To permanently set aside certain lands in Utah as an addition to the Navajo Indian Reservation, and for other purposes1
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all vacant, unreserved, and undisposed of public lands within the areas in the southern part of the State of Utah, bounded as follows: Beginning at a point where the San Juan River intersects the one hundred and tenth degree ..[metes and bounds omitted] thence in a westerly direction along the north boundary line of said reservation to the point of beginning be, and the same are hereby, ***permanently*** withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as the Secretary of the Interior may see fit to settle thereon: *Provided,* That no further allotments of lands *to* Indians on the public domain ***shall*** be made in San Juan County,

Utah, nor shall further Indian homesteads be made in said county under the Act of July 4, 1884 (23 Stat. 96; U.S.C., title 43, sec. 190). Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, *37 1/2 per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: Provided*, That said 37 1/2 per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.

SEC. 2.

That the State of Utah may relinquish such ***tracts of school land within the areas added to the Navajo Reservation*** by section 1 of this Act as it may see fit ***in favor of the said Indians***, and shall have the right to select other unreserved and nonmineral public lands contiguously or noncontiguously located within the State of Utah, equal in area and approximately of the same value to that relinquished, said lieu selections to be made in the same manner as is provided for in the Enabling Act of July 16, 1894 (28 Stat. L. 107), except as to the payment of fees or commissions which are hereby waived.

Approved, March 1, 1933" emphasis added.

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6. 1937 Navajo Nation is paid by the United States, for lands the Navajo Nation bought from Utah in the Utah Navajo Aneth Extension, with $20,000 Tribal funds, for the U.S. to hold in trust for the Nation. Chapter 570 August 9, 1937. | [H. R. 6958.] 50 Stat., 564.

> "An Act Making appropriations for the Department of the Interior for the fiscal year ending June 30, 1938, and for other purposes .... Purchase of land for Navajo Indians, Utah (tribal funds): For the purchase of lands and improvements thereon, and of improvements on former public-domain lands, within additions made to the Navajo Reservation, Utah, by Executive order of May 15, 1905, and the Act of March 1, 1933 (47 Stat., p., 1418),$20,000, payable from funds deposited to the credit of the Navajo Tribe."

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7. 1953 Congress lists states with some State Court authority over Indian Tribes ("280" Nations)

"28 USC § 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed .... shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State

(b) Alaska, California, Minnesota, Nebraska, Oregon, Wisconsin..."

8. 1959. April 1, 1959 the Navajo Nation displaces the Court of Indian Offenses with their own Court system. History of the Navajo Nation Courts by retired Chief Justice Robert Yazzie, Navajo Nation Judicial website. http://www.navajocourts.org/Index.htm

9. 1967 The Navajo Nation adopts the Navajo Nation Bill of Rights 1 N.T.C. Sec. 1 et seq. (enacted October 1, 1967).

"Navajo Nation Bill of Rights

> **3. Denial or abridgment of rights on basis of sex; equal protection and due process of Navajo Nation law.**
> Life, liberty, and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex nor shall any person within its jurisdiction be denied equal protection in accordance with the laws of the Navajo Nation, nor be deprived of life, liberty or property, without due process of law. Nor shall such rights be deprived by any bill of attainder or ex post facto law.
>
> **7. Rights of accused; trial by jury; right to counsel.**
> .....No person accused of an offense punishable by imprisonment and no party to a civil action at law, as provided under 7 NNC 651 shall be denied the right, upon request, to a trial by

jury of not less than six (6) persons; nor shall any person be denied the right to have the assistance of counsel, at their own expense, and to have defense counsel appointed in accordance with the rules of the courts of the Navajo Nation upon satisfactory proof to the court of their inability to provide for their own counsel for the defense of any punishable offense under the laws of the Navajo Nation.

10. 1968 An act amending the Aneth Extension Act Public Law 90-306 May 17, 1968 | [S. 391] 82 Stat. 121 setting royalties for the Utah Navajo health, education and welfare.

AN ACT To amend the Act of March 1, 1933 (47 Stat. 1418), entitled "An Act to permanently set aside certain lands in Utah as an addition to the Navajo Indian Reservation, and for other purposes". *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 1 of the Act of March 1, 1933 (47 Stat. 1418), is amended by deleting all of that part of the last proviso of said section 1 after the word "Utah" and inserting in lieu thereof: "for the health, education, and general welfare of the Navajo Indians residing in San Juan County. Planning for such expenditures shall be done in cooperation with the appropriate departments, bureaus, commissions, divisions, and agencies of the United States, the State of Utah, the county of San Juan in Utah, and the Navajo Tribe, insofar

as it is reasonably practicable, to accomplish the objects and purposes of this Act. Contribution may be made to projects and facilities within said area that are not exclusively for the benefits of the beneficiaries hereunder in proportion to the benefits to be received therefrom by said beneficiaries, as may be determined by the State of Utah through its duly authorized officers, commissions, or agencies. An annual report of its accounts, operations, and recommendations concerning the funds received hereunder ***shall*** be made by the State of Utah, through its duly authorized officers, commissions, or agencies, *to the Secretary of the Interior and to the Area Director of the Bureau of Indian Affairs for the information of said beneficiaries.*"

Approved, May 17, 1968. Emphasis added.

11. 1968 April 11, 1968, Congress adopts the Indian Civil Rights Act

25 USC § 1301. Definitions

"For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and **tribunals by and through which they are executed, including courts of Indian offenses**; and means the **inher-**

ent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;
(3) "Indian court" means any Indian tribal court or court of Indian offense"

§ 1302. Constitutional rights
"No Indian tribe in exercising powers of self-government shall—
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law" Emphasis added.

25 USC § 1303. Habeas corpus
"The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." Emphasis added.

25 USC § 1322. Assumption by State of civil jurisdiction

"(a) Consent of United States; force and effect of civil laws
The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption...." Emphasis added.

25 USC § 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

> "Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. **The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be. " emphasis.**

25 USC § 1326. Special election

> "State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, **shall** be applicable in Indian country **only** where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. ...." Emphasis added.

12. 1975 The Indian Self Determination Act (25 USC §450 et seq.) recognizing the pre existent Indian Nation inherent sovereignty and independence.

> "§ 450. Congressional statement of findings
> (a) Findings respecting historical and special le-

gal relationship, and resultant responsibilities
The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—
(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and
(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons. "

13. 1992 The United Nations International Covenant on Civil and Political Rights (ICCPR) was adopted on 16 Dec. 1966 and was put into force on 23 March 1976. President Carter signed the ICCPR Oct. 5, 1977. The United States ratified the treaty Sept. 8, 1992 [hereinafter ICCPR]. [1]

"PART I
Article 1

---

[1] Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 1 (102d Sess. 1992), reprinted in 31 I.L.M . 645 (1992) [hereinafter Senate Comm. Report].

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."

14. 1994 Amendments to the Indian Self Determination Act.

25 USC §450l. Contract or grant specifications

..... **(c) Model agreement**

The model agreement referred to in subsection (a)(1) of this section reads as follows:

"SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE XXXXXX TRIBAL GOVERNMENT.

"(a) Authority and Purpose.—

"(1) Authority.—.... The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) are incorporated in this agreement.

"(2) Purpose.—Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract ***shall be liberally construed for the benefit of the Contractor*** to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), ...

.... "(7) Records and monitoring.—

(C)(i) the Contractor agrees to one or more additional visits; or "(ii) the appropriate official determines that there is reasonable cause to believe that grounds for reassumption of the Contract, suspension of Contract payments, or other serious Contract performance deficiency may exist.

"(13) Administrative procedures of contractor.—Pursuant to the Indian Civil Rights Act of 1968 (25

U.S.C. 1301 et seq.), the laws, policies, and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to programs, services, functions, and activities that are provided by the Contractor pursuant to this Contract.

.....(c) obligation of the contractor....

(5) Fair and uniform services.—The Contractor shall provide services under this Contract in a fair and uniform manner and shall provide access to an administrative or judicial body empowered to adjudicate or otherwise resolve complaints, claims, and grievances brought by program beneficiaries against the Contractor arising out of the performance of the Contract.

"(d) Obligation of the United States.—

"(1) Trust responsibility.—

"(A) In general.—The United States reaffirms the trust responsibility of the United States to the XXXXXX Indian tribe(s) to **protect and conserve the trust resources of the Indian tribe(s) and the trust resources of individual Indians.**

(e) other provisions

(2) Contract modifications or amendment.—

"(A) In general.—Except as provided in subparagraph (B), **no modification to this Contract shall take effect unless such modification** is made in the form of a written amendment to the Contract, and the **Contractor** and the Secretary **provide written consent for the modification." Emphasis added**

25 USC § 450m–1. Contract disputes and claims

".... (b) Revision of contracts

The Secretary shall not revise or amend a self-determination contract with a tribal organization without the tribal organization's consent."

25 USC § 450f. *Self-determination contracts*

"(c) **Liability insurance; waiver of defense**
(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this subchapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act."

15. 1994 "U.S. REPORT UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS JULY 1994

"Under U.S. law, Native American tribes are distinct, **independent** political communities, ... Perhaps the most fundamental principle of the law governing the relationship between the United States and Native American tribes is the principle that the powers vested in Native American tribes **are inherent powers of a limited sovereignty which has never been extinguished.** They are not, in general, delegated powers granted by acts of Congress.....

The Supreme Court has recognized that, as a general rule, states lack authority to exercise their civil, regulatory laws on Native American territory. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).....

The Supreme Court has held that tribal courts are the proper forum for the adjudication of civil disputes involving Native Americans and non-Native Americans arising on a reservation. Fisher v. District Court, 424 U.S. 382 (1976). "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty, and, as a result, "**[c]ivil jurisdiction over such activities presumptively lies in the tribal courts, unless affirmatively limited by a specific treaty provision or federal statute." Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).....**

Self-Governance Demonstration Project. **In 1988 amendments to the ISDA, Congress established a Self- Governance Research and Demonstration Project involving 20 Indian tribes. Title III, Pub. L. No. 100-472, 102 Stat. 2296 (1988).** The purpose of the Self-Governance Project is to allow tribes greater flexibility in administering their own programs and services with minimal federal governmental involvement. The participant tribes sign a self governance compact with the government and are allowed to redesign BIA programs and redistribute funding according

to tribal priorities. The tribes in the demonstration program operate BIA programs with only limited requirements to adhere to federal regulations and record-keeping requirements. In December 1991, Congress increased to 30 the number of tribes eligible to participate in the Self- Governance Project and extended the demonstration period from 1993 to 1996. Pub. L. No. 102-184, 105 Stat. 1278 (1991)....

Once aboriginal rights are recognized by Congress, then the tribe has title that cannot be extinguished without a clear and specific action by

Congress in a treaty, statute or executive order, and compensation for the extinguishment of the right. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); United States ex rel. Hualapai Indians v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941)..." emphasis added.

15. 1994 Navajo Nation enters its Judicial Program ISDA contracts.

16. 2005 The United States President reports to the **United Nations Updated Core Document Forming Part of the Reports of the United States of America regarding the U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS**

Released by the Bureau of Democracy, Human Rights and Labor October 21, 2005 http://www.state.gov/g/drl/rls/55516.htm

"Implementation

156. When necessary to carry out its treaty obligations, the United States generally enacts implementing legislation rather than relying on a treaty to be "self-executing". .....

157. **However, the United States does not believe it necessary to adopt implementing legislation when domestic law already makes adequate provision for the requirements of the treaty....**

Similarly, because the basic rights and fundamental freedoms guaranteed by the International Covenant on Civil and Political Rights (other than those to which the United States took a reservation) have long been protected as a matter of federal constitutional and statutory law, it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law. That important human rights treaty was accordingly ratified in 1992 shortly after the Senate gave its advice and consent. "

.....

Published by the U.S. Department of State Website at http://www.state.gov maintained by the Bureau of Public Affairs.

U.S. CONSTITITUTION 5TH AMENDMENT DUE PROCESS CLAUSE

"No person shall ....be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONSTITUTION ARTICLE VI TREATY

'SUPREMACY CLAUSE'

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

FRCP at 16(c)(2)(A) reads as follows:

"At any pretrial conference, the court may consider and take appropriate action on the following matters: ...(c)(2)(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses; "

Lyman Valdez Docket Entries for case 2:00cv0584

03/14/2002	300	.....Deadline for filing of all post-discovery dispositive motions 6/3/02

11/06/2002	438	Motion by Steven MacArthur, Michelle Lyman, Helen Valdez, Candace Laws, Linda Cacapardo, Sue Burton, Amy Terlaak, Alison Dickson, Candace Holiday, Nicole Roberts, Donna Singer, Fred Riggs to amend [1-1] and supplement complaint to conform to the evidence and the Tenth Circuit Court 10-7-02 opinion. Jury Demand. (blk) (Entered: 11/07/2002)
11/12/2002	441	AMENDED Notice of Hearing filed: Final Pretrial Conference reset for 2:00 11/14/02 To be held before Judge BSJ cc:atty (Ntc generated by: Chmbrs, KS) (alt) (Entered: 11/12/2002)
11/12/2002	442	Memorandum by San Juan Health dfts in opposition to [439-1] motion to extend time for pretrial proceedings (Entered: 11/13/2002)
11/13/2002	443	Motion by San Juan Health Service District dfts to dismiss plas'

		Rico claims (Entered: 11/14/2002)
11/13/2002	444	Memorandum by San Juan Health dfts in support of [443-1] motion to dismiss plas' Rico claims (Entered: 11/14/2002)
11/13/2002	445	Motion by San Juan Health Service Dist dfts to dismiss plas' Health Care Quality Improvement Act claims (Entered: 11/14/2002)
11/13/2002	446	Memorandum by San Juan Health dfts in support of [445-1] motion to dismiss plas' Health Care Quality Improvement Act claims (Entered: 11/14/2002)
11/13/2002	447	Motion by San Juan Health Service Dist dfts to dismiss plas' Emtala claims (Entered: 11/14/2002)
11/13/2002	448	Memorandum by San Juan Health dfts in support of [447-1] motion to dismiss plas' Emtala claims (Entered: 11/14/2002)
11/14/2002	450	Motion by San Juan Health Service District dfts to dismiss plas' claims of interference with commerce by threats (Entered: 11/15/2002)
11/14/2002	451	Memorandum by San Juan

		Health dfts in support of [450-1] motion to dismiss plas' claims of interference with commerce by threats (Entered: 11/15/2002)
11/14/2002	452	Motion by San Juan Health Service Dist dfts to dismiss plas' mail fraud claims (Entered: 11/15/2002)
11/14/2002	453	Memorandum by San Juan Health Service Dist dfts in support of [452-1] motion to dismiss plas' mail fraud claims (Entered: 11/15/2002)
11/14/2002	454	Motion by San Juan Health Service Dist dfts to dismiss plas' antitrust claims (Entered: 11/15/2002)
11/14/2002	455	Memorandum by San Juan Health dfts in support of [454-1] motion to dismiss plas' antitrust claims (Entered: 11/15/2002)
11/14/2002	456	Motion by San Juan Health Service Dist dfts to dismiss plas' witness tampering claims (Entered: 11/15/2002)
11/14/2002	457	Memorandum by San Juan Health dfts in support of [456-1] motion to dismiss plas' witness tampering claims (Entered: 11/15/2002)

06/13/2005	742	MEMORANDUM DECISION AND ORDER- Plas Rule 15 Motion to Amend and Supplement Complaint to Conform to the Evidence and the 10th Circuit court 10-7-02 Opinion and Memorandum in Support of is GRANTED nunc pro tunc to 11/14/02 and the Clerk of the Court is directed to file the proposed Amended Complaint. It is further ORDERED that claims of Pla Dr. Steven MacArthur shall be DISMISSED with prejudice as against all of the dfts, except for the claims against dfts Dr. James Redd, Dr. L. Val Jones, Laurie Schafer, Dr. Manfred Nelson and Cleal Bradford, Julie Bronson and Marilee Bailey, those claims are hereby DISMISSED without prejudice. It is further ORDERED that the claims of Pla Michelle Lyman shall be DISMISSED against all the dfts, except for the claims against dfts Dr. James Redd, Dr. L. Val Jones, Laurie Schafer, Dr. Manfred Nelson and Cleal Bradford, those claims are DISMISSED without prejudice. It is further ORDERED that the claims of Pla Helen Valdez shall be DISMISSED with prejudice as against the dfts and in particular

		dfts Lori Wallace and the San Juan Health Svcs District. It is futher ORDERED the court DENIES Valezs 664 Motion for Reconsideration,DENIES Valdezs 664 Motion for Summary Judgment. It is further ORDEREDED that the court DENIES MacArthurs 670 Motion for Reconsideration, DENIES MacArthurs 670 Motion for Summary Judgment. It is further ORDERED that the court DENIES Lymans 695 Motion for Summary Judgment. It is further ORDERED that the court DENIES Plas(MacArthur, Lyman and Valdez) 703 Motion for Sanctions. IT IS FURTHER ORDERED that a a printed copy of the Proposed Pretrial Order received by the court on 11/12/02 shall be lodged by the Clerk of the Court in the file as part of the record in this action and that an electronic copy is attached(to this order) as part of the permanent CM/ECF case record in this action. Signed by Judge Bruce S. Jenkins on 6/13/05. (Attachments: # 1 Pretrial Order Exhibits)(jmr) Additional attachment(s) added on 6/15/2005 (jmr,). Additional attachment(s) added on 6/15/2005 (jmr,). (Entered: 06/14/2005)

AGREEMENT BETWEEN THE SECRETARY OF THE DEPARTMENT OF THE INTERIOR AND THE NAVAJO NATION

A. Authority and Purpose

1. Authority

"This agreement, denoted a Self-Determination Contract (referred to in this agreement as the "Contract"), is entered into by the Secretary of the Interior or the Secretary of Health and Human Services (referred to in this agreement as the "Secretary"), for and on behalf of the United States pursuant to Title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et sec.) and by the authority of the Navajo Nation (referred to in this agreement as the "Contractor"), The provisions of Title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.) are incorporated in this agreement.

2. Purpose

Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et sea.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities and programs (or portions thereof), that are otherwise contractible under Section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: Judicial Program. In accordance with Section 100, Scope of Work, and other attachments.

B. Terms, Provisions and Conditions

1. Term

Pursuant to Section 105(c)(1) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450j (c) (1) the term of this contract shall be six (6) years. Pursuant to Section 105 (d) (1) of such Act (25 U.S.C. 450j (d) , upon the election by the Contractor, the period of this Contract shall be determined on the basis of a calendar year, unless the Secretary and the Contractor agree on a different period in the annual funding agreement incorporated by reference in subsection (F)(2).

2. Effective Date

This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

3. Program Standards

The Contractor agrees to administer the program, services, functions and activities (or portions thereof) listed in subsection (A) (2) of the Contract in conformity with the following standards: in accordance with Navajo Nation Law and the Indian Civil Rights Act.

4. Funding Amount

Subject to the availability of appropriations, the Secretary shall make available to the Contractor the

total amount specified in the annual funding agreement incorporated by reference in subsection (F).(2). Such amount shall not be less than the applicable amount determined pursuant to Section 106 (a) of the Indian Self-determination and Education Assistance Act (25 U.S.C. 450j-1).

5. Limitation of Costs

The Contractor shall not be obligated to continue

Supreme Court, U.S.
FILED
MAR 23 2010
OFFICE OF THE CLERK

No. 09-997

In The Supreme Court of the United States

AL DICKSON, et al.,

Petitioners,

v.

SAN JUAN COUNTY, UTAH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SAN JUAN HEALTH SERVICES DISTRICT, PAST AND PRESENT MEMBERS OF THE BOARD OF TRUSTEES, REID WOOD AND LAUREN SCHAFER

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals properly (i) affirmed the district court's denial of petitioners' Rule 60 motion for relief from final judgment and (ii) enjoined petitioners and their counsel from seeking enforcement of the tribal court orders at issue in this matter in any other forum.

PARTIES TO THE PROCEEDING

Petitioners

Petitioners Fred Riggs, Donna Singer and Alison Dickson are plaintiffs below and were plaintiffs in the action before the Navajo tribal court.

Respondents

Respondents San Juan Health Services District, past and present members of the Health District Board of Trustees, including but not limited to Karen Adams, Roger Atcitty, Patsy Shumway and John Lewis, and Reid Wood and Lauren Schafer (collectively called "respondents" or "Health District respondents") are defendants below and were defendants in the action before the Navajo tribal court.

Additional Parties in this Court

San Juan County, J. Tyron Lewis, Lynn Stevens, Manuel Morgan, Bill Redd, Rick Bailey and Craig Halls (collectively "San Juan County respondents") are additional respondents and defendants below and were defendants in the action before the Navajo tribal court.

Additional Parties Below

Michele Lyman and Helen Valdez (the "non-tribal court plaintiffs") were additional plaintiffs below, but

PARTIES TO THE PROCEEDING – Continued

were not parties in the Navajo tribal court and are not parties to the petition for certiorari.[1]

Cleal Bradford, John Housekeeper, Gary Holliday, Dr. James Redd, Dr. Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Laurie Wallace, Carla Grimshaw, Gloria Yanito, Julie Bronson were additional defendants below but were not parties in the Navajo tribal court.

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[1] Although the claims of the non-tribal court plaintiffs were factually and legally distinct from those of petitioners, the initial action filed below included both sets of claims in one action. However, litigation of the two sets of claims, and appeals related thereto, have, for the most part, proceeded separately. The Tenth Circuit Court of Appeals decided the final appeal of the non-tribal court plaintiffs (adversely to the plaintiffs) on October 1, 2008. *Lyman v. San Juan County,* 2008 U.S. App. LEXIS 20968 (10th Cir. Oct. 1, 2008). No timely petition for certiorari was filed. Petitioners assert that by using a consolidated caption containing the names of Lyman and Valdez, the Tenth Circuit "chose to incorporate by reference" all rulings related to both petitioners and Lyman and Valdez," allowing petitioners to seek review of Tenth Circuit's 2008 decision. Petition at 2. However, the Tenth Circuit's 2008 ruling with respect to the non-tribal court plaintiffs is final and the use of a consolidated caption cannot revive it.

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OPINIONS BELOW

The July 2, 2008 Memorandum Opinion & Order Re: Post Mandate Motions ("Memorandum Opinion & Order") of the United States District Court for the District of Utah, Central Division ("district court"), is reported at *MacArthur v. San Juan County,* 566 F. Supp. 2d 1239 (D. Utah 2008).[2] The December 10, 2009 decision of the United States Court of Appeals for the Tenth Circuit ("court of appeals") is reported at *Dickson v. San Juan County,* 2009 U.S. App. LEXIS 26908 (10th Cir. Dec. 10, 2009) ("*Dickson*") and is reprinted at P. App. 1a-12a.

BASIS FOR JURISDICTION

The court of appeals entered its decision on December 10, 2009. Petitioners Singer, Riggs and Dickson filed the petition for writ of certiorari on February 16, 2010, and the petition was placed on the docket on February 24, 2010. Pursuant to Supreme Court Rule 15.3, respondents file this Brief in Opposition to the petition for writ of certiorari within thirty days of February 24, 2010.

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[2] Petitioners failed to include the district court's July 2, 2008 Memorandum Opinion & Order in their Appendix and instead included a copy of an order that was also entered by the district court on July 2, 2008, but which was not part of petitioners' appeal. *See* Petitioners' Appendix ("P. App.") at 13a-15a.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

A detailed recitation of the factual background of this case is unnecessary and therefore the Health District respondents address only the procedural background of the case. Petitioners filed a complaint in the Navajo Nation against the Health District respondents and San Juan County respondents. Petitioners' claims pertained to their employment at the Montezuma Creek Health Clinic, which was located in San Juan County within the exterior boundaries of the Navajo Nation and, prior to January 1, 2000, was operated by the Health District. *Dickson*, 2009 U.S. App. LEXIS 26908, P. App. at 2a-3a. In December 1999, the Navajo tribal court entered a sweeping preliminary injunction against the Health District parties and other defendants. Thereafter, petitioners sought to enforce tribal court's injunction and other related orders by filing suit in federal district court. The district court dismissed the case on the grounds of sovereign immunity. *Id.* On appeal, the court of appeals remanded the matter to the district court, directing it to conduct an analysis of the tribal court's subject matter jurisdiction over the Health District and San Juan County respondents before reaching the issue of sovereign immunity. *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002) ("*MacArthur I*"). After conducting the required

analysis, the district court again granted judgment in favor of the Health District and San Juan County respondents. *MacArthur v. San Juan County*, 391 F. Supp. 2d 895, 1056-57 (D. Utah 2005) ("*MacArthur II*").

On appeal, the court of appeals affirmed the district court's judgment in favor of respondents, finding the tribal court orders were unenforceable because the Navajo tribal court lacked subject matter jurisdiction over nearly all of the respondents' activities. *MacArthur v. San Juan County*, 497 F.3d 1057, 1067 (10th Cir. 2007) cert. denied, 552 U.S. 1181 (2008) ("*MacArthur III*"). Petitioners sought review of the *MacArthur III* decision by this Court, but their petition for certiorari was denied. Following *MacArthur III* and the subsequent denial of certiorari, petitioners filed numerous motions in federal and tribal court seeking to avoid the *MacArthur III* decision and enforce the tribal court orders. In particular, petitioners filed a Federal Rule of Civil Procedure 60(b) motion asking the district court to alter the holding of *MacArthur III*, and enforce the tribal court orders. *Dickson*, 2009 U.S. App. LEXIS 26908, P. App. at 5a.

The district court denied the Rule 60(b) motion, holding that petitioners were seeking to re-litigate issues resolved in *MacArthur III*, and that the law of the case doctrine precluded reconsideration. *MacArthur v. San Juan County*, 566 F. Supp. 2d 1239, 1251 (D. Utah 2008) ("*MacArthur IV*"). The district court also granted a permanent injunction against

petitioners and their counsel from further attempts to enforce the tribal court judgment and from proceeding in any forum to re-litigate the questions of jurisdiction, immunity and enforceability of the tribal court orders already decided by the court of appeals in *MacArthur III*. *Id.* at 1249-1252. Petitioners appealed the district court's denial of their Rule 60(b) motion and the court's imposition of a permanent injunction. The court of appeals affirmed the district court in all aspects. *Dickson,* 2009 U.S. App. LEXIS 26908, P. App. at 9a-10a.

REASONS FOR DENYING THE PETITION

The petition must be denied for several reasons. First, petitioners' failure to brief the relevant issues – denial of their Rule 60(b) motion and the grant of injunctive relief – requires denial of the petition. Moreover, the court of appeals correctly held that denial of the Rule 60(b) motion was required by the law of the case doctrine and appropriately affirmed imposition of injunctive relief.

I. PETITIONERS' FAILURE TO BRIEF THE APPROPRIATE ISSUE WARRANTS DENIAL OF THE PETITION

Supreme Court Rule 10 provides that a petition for writ of certiorari should only be granted for

compelling reasons.[3] Pursuant to Supreme Court Rule 14.1(h), the petition should provide a "direct and concise argument amplifying the reasons relied on for allowance of the writ." Here, petitioners not only fail to present a compelling reason for granting certiorari, they fail to address the relevant issue raised by the appeal – whether the district court correctly denied their Rule 60 motion for relief and properly granted injunctive relief against them. Instead of addressing the relevant issues, petitioners seek to revisit and relitigate the issues settled in *MacArthur III*, a decision for which certiorari was previously sought and denied. Because petitioners failed to brief the issues relevant to their petition, it should be denied.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PETITIONERS' RULE 60(B) MOTION

The court of appeals properly found that review of petitioners' Rule 60(b) motion was barred by the law of the case doctrine. As the court of appeals

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[3] Such reasons generally include a split between one or more federal circuit courts of appeals on an important federal law issue, a split between a state court of last resort and a federal circuit court of appeals on an important federal law issue, an instance where a court has acted outside of its own jurisdiction, or where a state court or federal circuit court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

found, both in the district court and on appeal, petitioners sought to re-litigate the very same questions answered by the court of appeals in *MacArthur III*, i.e., did the tribal court have subject matter jurisdiction over petitioners and do federal courts have jurisdiction to answer this question. *Dickson,* 2009 U.S. App. LEXIS 26908, P. App. at 7a-8a. Both here and on appeal, petitioners continued to assert vehemently that *MacArthur III* was wrongly decided, as was *Montana v. United States,* 450 U.S. 544 (1981), the seminal case on tribal court jurisdiction.

As the court of appeals noted, under "the law of the case doctrine, 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Dickson,* 2009 U.S. App. LEXIS 26908, P. App. at 8a, *quoting Arizona v. California,* 460 U.S. 605, 618 (1983). Under the law of the case doctrine, both the district courts and appellate courts are bound by a prior appellate decision in the same case. This rule is based on sound public policy that litigation should have an end, and parties should not be allowed to continue to re-litigate and re-argue settled issues. *Gage v. Gen. Motors Corp.*, 796 F.2d 345, 349 (10th Cir. 1986).

Petitioners fail to address the law of the case doctrine, much less provide any authority suggesting its application in this case was incorrect. As this case demonstrates, without the law of the case doctrine, "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to

listen to criticisms on their opinions. . . ." *Dickson*, 2009 U.S. App. LEXIS 26908, P. App. at 8a-9a, *citing*, *Roberts v. Cooper*, 61 U.S. 467, 481 (1857). As the court of appeals stated, "we cannot emphasize to Appellants strongly enough that this matter is at an end." *Id.* at 11a. The court of appeals properly affirmed the district court pursuant to the law of the case doctrine, and the petition should be denied.

III. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S IMPOSITION OF A PERMANENT INJUNCTION

In its order, the district court granted a motion by the San Juan County respondents to enjoin permanently petitioners and their counsel from seeking to enforce in any way the orders issued by the tribal court against the defendants in tribal court or in any other court. Given the finality of the *MacArthur III* decision, and petitioners' continued attempts to circumvent that ruling, the court of appeals properly affirmed the injunctive relief entered by the district court. Petitioners fail to present any argument or authority suggesting the court of appeals or district court erred in granting injunctive relief and their petition must therefore be denied.

CONCLUSION

For the reasons set forth above, the petition must be denied.

Respectfully submitted,

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Counsel for Respondents San Juan Health Services District, Past and Present Members of the Board of Trustees, Reid Wood and Lauren Schafer

SUPREME COURT, U.S.
APR 6 - 2010

No. 09-997

IN THE

Supreme Court of the United States

AL DICKSON, FRED RIGGS, DONNA SINGER AND MICHELE LYMAN AND HELEN VALDEZ, PETITIONERS

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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The Respondents' brief does not dispute the facts of wilful intentional harms to all the Petitioners. "A detailed recitation of the factual background of the case is unnecessary...." Resp. brief pg. 2.

II. RESPONDENTS RECHARACTERIZATION OF THE CASE IS A 'RED HERRING' AVOIDING DEALING WITH JURISDICTION ISSUES

There is no dispute to the Petitioners' law. The Respondents' argument that recharacterizes the case as a Rule 60 and 'law of the case' type of case, is a 'red herring' meant to divert the Court's attention from the true and valid *undisputed* issue: i.e. these Petitioners have been deprived of all access to due process and an evidentiary hearing by;

(a) this Court's Montana [1]doctrine (Petitioners' Singer, Riggs, and Dickson)(denying all Navajo Court authority over non Indians); and
(b) this Court's Federal Rule of Civil Procedure ("FRCP") at 16 (Petitioners Lyman and Valdez)(allowing discretionary dismissal of their evidentiary based claims *without an evidentiary hearing*),

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thus rendering such judgments void [2] as beyond U.S. Constitutional Article III authority. The Respondents fail to explain how or why the Court can exercise the such 'presumed' jurisdictional authority these Petitioners directly challenge.

III. RESPONDENTS DO NOT FULLY INFORM THE COURT AS TO WHY THE 10TH CIRCUIT COURT JOINED THE PETITIONER'S CASES

For Petitioners Lyman and Valdez, the Respondents do not inform this Court that it is they who initially sought to combine the Lyman and Valdez 10th Circuit case 07-4267 into the 10th Circuit's case 08-4148 for Singer, Dickson, and Riggs. Contrary to Respondents, the 10th Circuit did more than just place Lyman and Valdez' name in the caption, it addressed their Respondent initiated review of their case in Dickson v. San Juan County, 2009 U.S. App. LEXIS 26908, fn. 2 (10th Cir. Dec. 10, 2009), granting the *Respondents*' request to consider that case, thereby incorporating the case by reference into 10th Circuit case 08-4148--- as they were combined initially in the U.S. District Court case

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[2] "A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). "[T]he constitution, by prohibiting an act, renders it void, if done; otherwise, the prohibition were nugatory. Thus, the warrant is a nullity." Anderson v. Dunn, 19 U.S. 204, 217 (1821). "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal." Valley v. Northern Fire & Marine Ins. Co., 254 U.S. 348, 354 (1920).

2:00cv0584 in 2000. The 10th Cir. Panel did not have to do so, but it did. Further, the Respondents error by saying this Petition is to 'revive' that case, Resp. brief fn. 1, because a 'void judgment' never becomes final, and is always void even prior to reversal, leaving nothing to 'revive'. Valley, *supra.*

IV. PETITIONERS DID ADDRESS THE 'LAW OF THE CASE'

For all Petitioners, contrary to Respondents' assertion, in fact the "law of the case" doctrine *was* addressed in the Petition. For all the Petitioners, a judgment issued depriving all of access to due process, can never be the 'law of the case' being Constitutionally void. Fn. 2 *supra.* For Navajo Court Petitioners Dickson, Riggs and Singer, it was shown that for the "Montana" doctrine, the law of the case doctrine only apparently is applied when it is 'anti-Indian'. The MacArthur v. San Juan County, 309 F.3d 12116 (10th Cir. 2002) ruling clearly stated that minor political subdivisions do not enjoy any state immunity for Navajo or Treaty violations, while the MacArthur v. San Juan County, 497 F.3d 1057, 1067(10th Cir. 2007) ruled they did, and without the required *en banc* hearing.

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Respondents cite to their injunctive relief, without telling the Court *what* Petitioners' actions are being enjoined. 2002 MacArthur mandated the application of Nat'l Farmers Union Ins. v. Crow Tribe, 471 U.S. 845

(1985). Now, Petitioners by Montana are (a) wholly deprived of their Nat'l Farmer's exhaustion by MacArthur v. San Juan county 566 F. Supp. 2d 1239 (D. Utah 2008) and (b) wholly deprived of their 2005 MacArthur v. San Juan County 391 F. Suupp. 2d 895 (D. Utah 2005) exhaustive National Farmer's analysis of Congressional intent wherein the *District Court* found Montana should never apply to the Navajo Nation's Aneth Extension. [3]

VI. RESPONDENTS DO NOT DISPUTE FEDERAL COURTS EXCEED JURISDICTION BY DIMINISHING NAVAJO COURT AUTHORITY

Respondents offer no law to rebut the Petitioner's citations to this Court's holdings of National Farmer and Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) that solidly state all Federal Courts have no subject matter jurisdiction to limit Tribal Court civil authority over non Indians beyond the intent of Congress and the President, as is being done here. "...[T]he power has always been deemed a political one not subject to be controlled by the courts." Id. At 553. If immunities are

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Marbury says "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy." Id. Attorneys should not be punished, by a state bar, at the behest of federal court opposing counsel, second-guessing federal courts that consistently refuse to invitations to discipline an attorney, for the attorney seeking Marbury relief *in whatever forum the law provides for her clients.*

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a source of hostile legislation, perhaps, of hostility of a still more serious nature..... On the Supreme Court of the United States has the Constitution of our country devolved this important duty." Id. at 400-401. Accepting this Petition will create Courts as instruments of peace generating clarity, predictability, consistency and adequate notice as to what the law is in areas of law now infamous for incoherency.

CONCLUSION

For all the foregoing reasons, these Petitioners were doubly injured, first by the Defendants on facts they do not dispute, willfully, blatently, with callous disregard for their rights, and then injured by Court's depriving them of their only due process. This petition, at this time, is just the right petition, for this Court to use, to resolve the conflicts in law Petitioners have identified.

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